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OGC Has Reviewed

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OGC 71-0655

6 May 1971

MEMORANDUM FOR: Director of Finance
SUBJECT: Losses of Funds

1. You have informally requested that we reconsider our earlier advice that claims involving the loss of funds advanced for official travel or employee living allowances are matters within the jurisdiction of the Board of Review.

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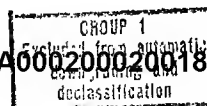
2. Under [REDACTED] the function of the Board of Review is to consider and recommend action for settlement of accounts of Agency personnel referred to it. It provides that personnel charged with a shortage of Agency funds may be relieved of responsibility whenever it is determined that the shortage occurred (a) while the responsible individual was acting in the discharge of his official duties or because of the act or omission of a subordinate; and (b) without fault or negligence on the part of the responsible individual. A shortage is defined to mean a deficiency of Agency funds, however caused, including loss, disappearance or theft. In terms of these provisions, you question whether a loss, disappearance or theft of funds advanced to Agency personnel under the provisions of the Travel Expense Act or the Overseas Differentials and Allowances Act can be considered to be a case involving a shortage of Agency funds.

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3. The procedure for relief set out in [REDACTED] is based on the Act of August 1, 1947, 61 Stat. 720, as amended (31 U.S.C.A. 82a-I). This provides that the General Accounting Office is authorized to relieve any disbursing or other accountable officer or agent charged with responsibility on account of physical loss or deficiency in Government funds,

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vouchers, records, checks, securities or papers in his charge, if it concurs with the determination of the head of the department that (a) the loss or deficiency occurred while such officer or agent was acting in the discharge of his official duties or that it was occasioned by reason of the act or omission of a subordinate and (b) the loss or deficiency occurred without the officer's or agent's fault or negligence.

4. The history of this legislation shows that it was initiated at the request of the Secretary of the Treasury for the sole purpose of providing, through the Comptroller General, a channel of relief for present and former disbursing personnel of the Treasury Department who were under liability on account of physical loss or deficiency in Government funds, vouchers, records or papers. The Secretary's justification was that the kind of relief proposed could at that time be granted only through the passage of a special relief bill by the Congress or by the responsible individual filing suit in the Court of Claims at his own expense.¹ The Committee noted that both methods were costly and time consuming. It also observed that for many years the disbursing officers of the military departments had had similar relief legislation.² While in Committee, the bill was expanded to include not only all Government disbursing officers, but accountable officers as well, the intention being to include those agents who may not disburse but yet are held responsible for funds, vouchers, records, checks, securities or papers entrusted to their charge. S. Rep. No. 379, 80th Cong., 1st Sess. (1947)

5. At the time the bill was under consideration in the Congress, the responsibilities of a disbursing officer were (a) disburse moneys

¹ Under 28 U.S.C.A. 1496, the Court has jurisdiction to render judgment upon a claim by a disbursing officer for relief from responsibility for the loss of Government funds, vouchers, records or other papers in his charge. Under 28 U.S.C.A. 2512, the Court's judgment that the loss occurred without fault or negligence is made binding on the General Accounting Office.

² Under 41 Stat. 132 and 58 Stat. 800, applicable to Navy and Army disbursing officers, respectively, the General Accounting Office must relieve the officer of responsibility for a loss or deficiency in Government funds, vouchers, records or papers, if the head of his department should determine that the loss or deficiency occurred without fault or negligence..

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only upon vouchers duly certified, (b) examine vouchers as to proper form, (c) be held accountable accordingly. Act of December 29, 1941, 31 U.S.C.A. 82c. Since the term "disbursing officer" is understood to mean an officer authorized to disburse funds of the United States (Romney v. United States, 167 F. 2d 521 (1948)) and "accountable officer" is defined as being an authorized disbursing officer, certifying officer or collecting officer (7 GAO Policy and Procedures Manual 28.3(1)), it is apparent that the basic statute is not for the relief of Government employees generally. Given the limited scope of the statute together with the meaning of the word "advance" as used in monetary transactions, coupled with the remedy for the recovery of funds with which the Government has armed itself, we now conclude that a loss of funds advanced for official travel and living allowances are not for settlement under [REDACTED]. Upon reconsideration, we believe the loss of such funds must be considered to be the loss of personal property and, consequently, a matter beyond the jurisdiction of the Board of Review.

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6. The authority to advance sums for travel and living expenses and the procedures for recovery of amounts not fully accounted for are set out in section 5 of the Travel and Expense Act of 1949 and section 202 of the Overseas Differentials and Allowances Act, respectively. In this connection, section 5 reads:

"The departments and establishments may advance, through the proper disbursing officers, to any person entitled to per diem or mileage allowances under this Act, such sums as may be deemed advisable considering the character and probable duration of the travel to be performed. Any sums so advanced and not used for allowable travel expense shall be recoverable by set-off of salary due, retirement credit, or otherwise, from the person to whom advanced, or his estate, by deduction from any amount due from the United States, or by such other legal method of recovery as may be necessary."

Section 202 provides:

"Allowances granted under this title may be paid in advance, or advance of funds may be made therefor, through the proper disbursing officer in such amounts as may be deemed advisable in consideration of the need and period of

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time during which expenditures must be made in advance by the employee or employees. Any advance of funds not subsequently covered by allowances accrued to the employee or employees under this title shall be recoverable by the Government by set-off against accrued salary, pay, compensation, amount of retirement credit, or other amount due from the Government to such employee or employees and by such other method as may be provided by law for the recovery of amounts owing to the Government." ³

7. As applied to money transactions the term "advance" means money paid before it is due or prior to the proper time. It implies that the parties look forward to the time when the money will be due the recipient. Gihon v. Stanton, 9 N. Y. 476 (1854) Thus, it has been held to mean to supply beforehand, to furnish on credit, to pay money before it is due, to prepay on account of an anticipated debt with money or its equivalent to be thereafter returned. Washington National Insurance Co. v. Employment Security Commission, 61 Ariz. 112 (1944)

8. Used in the sense of being a disbursement of funds in anticipation of an amount to be due, an advance is a loan. While the loan always implies a promise of repayment, it is none the less a loan although repayment is made dependent upon a contingency. ⁴ Island Petroleum Co. v. Commissioner of Internal Revenue, 57 F. 2d 992 (1932), cert. denied 287 U.S. 646. It is also immaterial that as a protective measure the lender may have restricted the purposes for which the advance may be used. Such action does not in any way detract from the advance any of its qualities as a loan. Whittemore Homes, Inc. v. Fleishman, 190 Cal. App. 2d 554 (1961)

9. A loan may be characterized as being either a loan for use or a loan for consumption, the distinction being dependent upon which

³ Under Title II advances may be made for (a) quarters allowance, (b) post allowance, (c) transfer allowance, (d) separate maintenance allowance, and (e) education allowance.

⁴ Repayment of advances for travel and living allowances are likewise made contingent upon their not having been used for allowable expenses.

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party has the proprietary interest. When the lender retains his proprietary interest in the article, the transaction is a loan for use. However, when an article, such as money, is loaned for consumption, title to the funds transferred becomes vested in the borrower. Hersfield v. Howard, Civ. App. Tex., 59 S.W. 55, (1900) Thus, it has been held that where a loan in the form of an advance was to be charged to the recipient's account, the funds became his property, a part of his estate and liable for the claims of his creditors. The Laflin and Rand Powder Company v. Burkhardt, 97 U.S. 61, 24 L. Ed. 973 (1878)

10. The remedy Congress has provided to ensure the recovery of advances not fully accounted for is fully consistent with our position that funds advanced to the employee are his personal property. Both the Travel Expense Act and the Overseas Differentials and Allowances Act specifically provide for recovery by set-off. This has been defined as a right existing between two parties to set off their debts by way of mutual deductions so that in an action the moving party may recover only the residue remaining after a deduction has been made for the amount owed. Scammon v. Kimball, 92 U.S. 362, 23 L. Ed. 483 (1876) Set-off is a procedural economy for the enforcement of mutual obligations of indebtedness. Columbia Aircraft Company v. United States, 163 F. Supp. 932 (1958) Being a procedure for the enforcement of a claim in debt, set-off does not give rise to an interest in the other party's property. Its existence does not impair or in any way restrict the other party's right of ownership. Until the right of set-off is exercised, the debtor may do as he pleases with his property. U.S. Bank and Trust Co. Case, 311 Pa. 320 (1933) In sum, as a procedural remedy in an action for debt, set-off is not consistent with a claim of ownership. We think that a similar result obtains in the case of an advance made by the Agency. Given the nature of the transaction contemplated by the statutes authorizing advances for travel and allowances, we do not believe the Agency can be considered to have retained its proprietary interest in the funds disbursed. Although funds of the United States in the hands of a disbursing officer are as much the property of the United States as though they had never been withdrawn from the Treasury, it has been held that once those monies are disbursed to one entitled to receive them, they become his property. In this connection see Buchanan v. Alexander, 45 U.S. 18, 11 L. Ed. 857 (1846) and Romney v. United States, supra.


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11. As a consequence of the view expressed above, the opinions of this office identified as OGC 66-1117 of 20 May 1966 and OGC 69-2199 of 21 November 1969 are expressly overruled.

12. In the hopes of dispelling the confusion that may have existed regarding the issue of ownership of funds advanced for employee travel and living allowances, we suggest that the wording "including funds advanced to Agency personnel" be deleted from the definition of "Agency funds" as contained in 

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Assistant General Counsel

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